

**THIS DISPOSITION  
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Hearing:  
February 1, 2000  
8/17/00

Paper No. 31  
RLS/MM

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re **Busch Entertainment Corporation**

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Serial No. 74/686,509

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Edward G. Wierzbicki of Pattishall, McAuliffe, Newbury,  
Hilliard & Geraldson for Busch Entertainment Corporation.

**Barbara A. Loughran**, Trademark Examining Attorney, Law  
Office 101 (**Jerry Price**, Managing Attorney).

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Before **Simms**, Hanak and Hohein, Administrative Trademark  
Judges.

Opinion by Simms, Administrative Trademark Judge:

Busch Entertainment Corporation (applicant) has  
appealed from the final refusal of the Trademark Examining  
Attorney to register the asserted mark EGYPT for "amusement  
park services; namely an area within an amusement park."<sup>1</sup>

The Examining Attorney initially refused registration under  
Section 2(e)(1) of the Act, 15 USC §1052(e)(1), on the  
ground that the asserted mark is merely descriptive of the

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<sup>1</sup> Application Serial No. 74/686,509, filed June 6, 1995, based  
upon an allegation of applicant's bona fide intention to use the  
mark in commerce. On June 13, 1996, the application was amended  
to allege use of the mark in commerce since May 25, 1996.

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theme of applicant's amusement park services. Applicant then amended its application to seek registration pursuant to Section 2(f) of the Act, 15 USC §1052(f), asserting that its mark has become distinctive through exclusive and extensive use. A portion of the specimens showing the asserted mark is reproduced below:

Thereafter, the Examining Attorney held that the evidence submitted under Section 2(f) of the Act was insufficient to

establish that the public has come to recognize "EGYPT" as indicating the source of applicant's services. Indeed, the Examining Attorney has held that "EGYPT" is essentially a generic term which identifies the theme or subject of applicant's theme park services and is not and cannot function as a source indicator for those services.

Applicant and the Examining Attorney have submitted briefs and an oral hearing was held.

We affirm.

**Examining Attorney's Refusal and Evidence**

Relying upon dictionary definitions, applicant's promotional literature, press releases and excerpts from the Nexis computer search system, the Examining Attorney contends that the name "EGYPT" is not capable of indicating source or origin in applicant. The Examining Attorney notes that "theme park" is defined as "an amusement park in which landscaping, buildings, and attractions are based on one or more specific themes, as jungle wildlife, fairy tales, or the Old West." Relying upon a number of articles, the Examining Attorney contends that theme parks frequently take the form of "re-creations" of various countries. The Examining Attorney has referred to the newspaper article excerpts of record indicating that other amusement parks offer visitors a "sampling of foreign

lands." Given the trend in creating "mini-countries" or creating theme parks or portions thereof based upon the culture or history of other foreign lands, the Examining Attorney contends that the public has become accustomed to recognizing the name of a location or country used in association with theme park services ("Hollywood," "Holland," etc.) as indicating nothing more than the particular location or country depicted or simulated in the theme park. That is, the public has come to understand, according to the Examining Attorney, that the name of a country used for such a theme park or portion thereof indicates the subject matter of that park or area and not the source or origin of the park or the entertainment services associated therewith. Because consumers are accustomed to the use of country names to describe a theme or motif of a theme park, the Examining Attorney argues that they would expect a theme park named "EGYPT" to be a theme park or area based upon or emulating the culture, history, etc. of that country. In this connection, the Examining Attorney notes publicity about a Redlands, California, Egyptian theme park opening in 1996 as well as Circus Circus's Egyptian-pyramid theme park.

The Examining Attorney has also noted that the part of applicant's theme park designated by the name "EGYPT" is

one of several themed areas within Busch Gardens Tampa Bay Park. Other areas within the park are called "Morocco," "Nairobi," "Timbuktu," "Congo" and "Stanleyville."

Applicant's brochures indicate that the "EGYPT" area is the park's ninth themed area in the park. According to the specimens of record:

Highlighting Busch Gardens' 1996 endeavors will be the grand opening of Egypt, the park's ninth themed area and largest expansion. Egypt's centerpiece is "Montu," the world's tallest and longest inverted steel roller coaster, named after a hawk-headed human bodied Egyptian sun god. Egypt also features a replica of King Tut's tomb, a children's sand dig area, train station, costume characters, Egyptian artisans and a variety of shopping bazaars housed under Bedouin tents.

From this and other material of record, the Examining Attorney concludes that the culture, history, etc. of Egypt are the central themes of applicant's theme park services offered under the name "EGPYT." Press coverage further indicates that "EGYPT" recalls "the African country's ancient civilization" and that "Egypt's historic mysteries and influences reveal themselves" in attractions at applicant's theme park. Applicant's promotional brochure invites guests to "[t]ravel through time and discover the mystery and intrigue of Egypt."

With respect to applicant's showing of acquired distinctiveness, the Examining Attorney maintains that proof of sales and advertising expenditures does not *per se* establish that a term has acquired significance as a mark even when the promotion has been significant and continuous. Rather, such evidence merely indicates the popularity or success in promoting applicant's theme park services, and does not show that the public has come to view the term "EGYPT" as indicating anything other than the theme of applicant's specific park services. It is the Examining Attorney's contention that, because the evidence demonstrates the Egyptian theme of applicant's theme park services, applicant's evidence of acquired distinctiveness does not establish that consumers recognize the term "EGPYT" as indicating the *source* of the applicant's services, but rather that this term indicates, names or describes the particular theme of applicant's amusement park services. In this regard, the Examining Attorney expresses the belief that "EGPYT" is generic because it names a sub-category of applicant's particular amusement park services.

**Applicant's Argument and Evidence**

Applicant argues that "EGPYT" is inherently distinctive and registrable on the Principal Register

without resort to Section 2(f) of the Act. In this regard, applicant maintains that this term is only suggestive of amusement park services because the word "EGPYT" is "so broad it cannot describe Busch Gardens' services with any degree of particularity. At the same time, Busch Gardens' services include elements that 'Egypt' can not possibly describe, creating an incongruity between the mark and the services." According to applicant, when broad geographical names are applied to amusement park services, they do not immediately describe those services. That is, this term is "too broad and too ambiguous as applied to amusement park services" to be descriptive or generic. Appeal Brief, 2.<sup>2</sup>

Further, applicant argues that the "EGPYT" area of applicant's amusement park has as its most prominent feature and main attraction a 104-foot tall inverted roller coaster, that the food sold in this area is typical American-style fast food and that most of the music played in this area is from American movies and not from the nation of Egypt.<sup>3</sup> While applicant acknowledges that there

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<sup>2</sup> While initially disputing that applicant had preserved its right to argue inherent distinctiveness in the alternative, the Examining Attorney has conceded in her brief, 5, that the issue of inherent distinctiveness has been preserved by applicant.

<sup>3</sup> In response to this argument, the Examining Attorney maintains that applicant cannot have the issue of descriptiveness or genericness judged by the actual features in this area of its amusement park but rather by the description in the application ("amusement park services, namely, an area within an amusement

are certain Egyptian elements within the EGYPT area--the replica of King Tut's tomb, a wall with Egyptian hieroglyphics and Egyptian artisans, it is applicant's position that such elements as the archaeological dig area and Bedouin tents relate generally to the North African/Middle Eastern area and are not uniquely associated with the country of Egypt. Even if all of these elements are taken together, according to applicant, they do not re-create or simulate Egypt. Applicant argues that the Examining Attorney has made an "incorrect assumption" that the country of Egypt is the theme of this part of applicant's amusement park (Reply brief, 2). Applicant also notes that this Office has allowed marks such as MYOMBE RESERVE and SERENGETI PLAIN (owned by applicant) to be registered on the Principal Register, and ASIA (on the Supplemental Register, owned by another company) for entertainment services. Applicant concludes that the term "EGPYT" encompasses a much broader range of things than are offered at applicant's theme park and that applicant offers attractions in its Egypt area that would never be associated with the country of Egypt.

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park"). The question of the descriptiveness or genericness of a term must, of course, be determined in relation to the goods or services set forth in the application. See In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987), and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978).

While maintaining that the asserted mark is not merely descriptive, applicant contends that even if the Board finds that "EGPYT" describes applicant's amusement park services, applicant has submitted "overwhelming evidence" that the mark has acquired distinctiveness. Since the opening of the "EGYPT" area in May 1996, which was extensively covered in newspapers and other news journals, applicant has spent over \$5 million dollars advertising, promoting and otherwise marketing this area of its amusement park. In addition, applicant has distributed over 5 million brochures prominently featuring this asserted mark; has distributed over 1.5 million maps prominently featuring the mark; aired television and radio commercials in Florida advertising this part of applicant's amusement park; published advertisements featuring this area of applicant's amusement park in national travel magazines, tourist and other publications; and placed billboard advertisements throughout the state of Florida promoting the "EGYPT" amusement area. Applicant has also sent a vehicle painted with this name to various Florida fairs, malls and other public places to advertise and promote this amusement area. Over 4 million people have ridden the roller coaster located in the "EGYPT" area of applicant's amusement park, and, according to applicant, no

one other than applicant has used this term for amusement park services. Applicant argues:

Applicant's EGYPT area within its amusement park has an Egyptian theme, and references to that theme, as well as to mummies and pyramids are quite natural. Egypt is, and will also remain, the name of a country. When one refers to amusement park services, however, EGYPT now also signifies a single unique source of such services. The articles and promotions clearly indicate that when mummies, pyramids, and other such Egyptian themed theme park services are offered under the mark EGPYT, those services come from a single source.

Response, 7, filed August 12, 1998. Applicant maintains that the primary significance of "EGYPT" in relation to amusement park services is to identify the source of applicant's services. According to applicant, if another competitor wanted to use a generic adjective to describe an Egyptian themed area of an amusement park, it could say that it has an Egyptian theme. Brief, 11. Finally, applicant maintains that any doubt about acquired distinctiveness should be resolved in applicant's favor.

Applicant also argues that the Examining Attorney has shifted her position, having maintained for much of the prosecution of this case that the asserted mark was descriptive, then deciding that the term was generic for applicant's services. Brief, 5. In response, the Examining Attorney correctly notes that TMEP §1219.02

indicates that, when an applicant seeks registration on the Principal Register, an Examining Attorney should refuse registration under Section 2(e)(1) on the ground that the asserted mark is merely descriptive, the issue of genericness technically not being before the Examining Attorney at this stage of the proceeding.

An examining attorney should not generally issue a refusal in an application for the Principal Register on the ground that a mark is a generic name for the goods or services unless the applicant asserts that the mark has acquired distinctiveness under §2(f) of the Trademark Act, 15 U.S.C. §1052(f). Absent such a claim, the examining attorney should issue a refusal on the ground that the mark is merely descriptive of the goods or services under §2(e)(1), even if the designation appears to be a generic name for the goods or services...

If the applicant amends its application to assert acquired distinctiveness under § 2(f), this presents a new issue for consideration by the examining attorney... If the examining attorney determines that the designation is a generic name for the applicant's goods or services, the examining attorney should then refuse registration on the Principal Register under §2(e)(1) on the ground that the designation is a generic name for the goods or services...

### **Discussion and Opinion**

We turn then to the essential issue before us--the registrability of the asserted mark "EGYPT" for an area of an amusement park. After careful consideration of this

record, we agree with the Examining Attorney that the term "EGYPT" is not registrable.

A term is merely descriptive of goods or services if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and In re Abcor Development Corp., *supra*, 200 USPQ at 217-18. A term need not immediately convey an idea of each and every specific feature of an applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. In re MBAssociates, 180 USPQ 338 (TTAB 1973). Whether a term is merely descriptive is determined, not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services set forth in the application, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of use. In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

We agree with the Examining Attorney that this record sufficiently demonstrates that the public understands the

name "EGYPT" as used in association with applicant's amusement park services to indicate the subject matter or country being represented or simulated, at least in part, in exhibits or features of the amusement park. The name "EGYPT" does not identify the source or origin of applicant's amusement park services but rather the Egyptian theme or motif of this "land" in applicant's amusement park. The press coverage notes that "EGYPT" is the ninth land in applicant's African-themed Busch Gardens park, and that this area recalls "the African country's ancient civilization." For an African-themed amusement park, the names of various countries located on that continent to identify parts of that park would not, it appears to us, be recognized by the public as proprietary service marks identifying applicant's services. Using applicant's logic, as expressed by counsel in his brief and at the oral hearing, it would be possible for an amusement park company to register such country names as Switzerland, France, Italy, China, etc., as service marks when they were used to identify an area of a theme park evocative of such lands. These country names should be just as unregistrable as, say, such words as "Automobiles," "Trains," "Airplanes" and "Ships" designating various areas in a theme park devoted to means of transportation.

Nor does the fact that applicant also has chosen to include in this area of its amusement park other rides or attractions that have no ostensible association with the country of Egypt lead us to reach a different result (this is an amusement park, after all, and not a museum). As noted, we must analyze this case on the basis of the description of services in the application and not on the basis of the actual features which are present in applicant's amusement park.

We believe that it is not necessary that we reach the question of genericness of the name "EGYPT," as used by applicant. However, in response to applicant's argument that the name "EGYPT" cannot be a generic term,<sup>4</sup> we would note that our principal reviewing court has recently held that the words "generic name" (in Section 14 of the Act) "must be read expansively to encompass anything that has the potential but fails to serve as an indicator of source, such as names, words, symbols, devices, or trade dress." Sunrise Jewelry Mfg. Corp. v. Fred S.A., 175 F.3d 1322, 50

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<sup>4</sup> See applicant's brief, 12, and reply brief, 16:

"Egypt" as a country name is a noun, and thus grammatically cannot serve as an adjective. The adjective form, "Egyptian", is not the mark sought to be registered. Further, EGYPT is not a generic adjective even by the Examining Attorney's own standard.

USPQ2d 1532, 1535 (Fed. Cir. 1999). Indeed, in that case, the Court held that even trade dress ("metallic nautical rope design") could be challenged on the ground that it is "generic." See also BellSouth Corp. v. Datanational Corp., 60 F.3d 1565, 35 USPQ2d 1554 (Fed. Cir. 1995)(affirming denial of registration of "walking fingers" design for telephone directory services as generic because it no longer represented source but identified the product generally); and Kendall-Jackson Winery, Ltd. V. E. & J. Gallo Winery, 150 F.3d 1042, 42 USPQ2d 1332 (9<sup>th</sup> Cir. 1998)(holding grape-leaf designs generic for wine).

Nevertheless, we believe that the asserted mark may be characterized as a highly descriptive one.<sup>5</sup> And, as our principal reviewing Court has noted concerning the possible registrability of merely descriptive terms which may nevertheless acquire distinctiveness or secondary meaning, "... the greater the degree of descriptiveness the term has, the heavier the burden to prove it has obtained secondary meaning." In re Bongrain International (American) Corp., 894 F.2d 1316, 13 USPQ2d 1727, 1728 n.4 (Fed. Cir. 1990),

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<sup>5</sup> See, for example, In re Boston Beer Co. L.P., 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999), where the Court of Appeals for the Federal Circuit held that the phrase "THE BEST BEER IN AMERICA" for beer and ale was "so highly...descriptive of the qualities of [applicant's] product that the slogan does not and could not function as a trademark to distinguish Boston Beer's goods and serve as an indication of origin."

and Yamaha International Corp. v. Hoshino Gakki Co. Ltd.,  
840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988).

Successful sales, advertising and promotion do not necessarily elevate a non-distinctive term into a distinctive trademark or service mark. Notwithstanding the promotion or use by applicant, the name "EGYPT" does not lose its significance of describing the theme of this part of applicant's amusement park.

The cases applicant has cited in support of registration, such as In re The House Store, Ltd., 221 USPQ 92 (TTAB 1983) ("THE HOUSE STORE" held not merely descriptive of retail store services in the field of furniture and housewares), and In re TMS Corp. of the Americas, 200 USPQ 57 (TTAB 1978) ("THE MONEY SERVICE" held not merely descriptive of a fund transfer service) are distinguishable on their facts. Finally, the registrations of such names as "ASIA," "SERENGETI PLAIN" and "MYOMBE RESERVE," do not compel us to reach a contrary result. Suffice it to say that these registrations are of little help in determining the registrability of the mark at issue in this case. As often noted by the Board, each case must be decided on its own set of facts, and we are not privy to the facts involved with those registrations. Moreover, the Board is not bound by actions taken by Examining Attorneys.

In re National Novice Hockey League, Inc., 222 USPQ 638, 641 (TTAB 1984), and In re Scholastic Testing Service, Inc., 196 USPQ 517, 519 (TTAB 1977). While uniform treatment under the Trademark Act is highly desirable, our task here is to determine, based upon the record before us, whether applicant's asserted mark is registrable.

Decision: The refusal of registration is affirmed.

R. L. Simms

E. W. Hanak

G. D. Hohein  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board